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7
8 UNITED STATES DISTRICT COURT
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA

10 BRANT E. KINNSCH, an individual,

Case No.

11
12 Plaintiff,

COMPLAINT FOR:

13
14 v.

15 ZWICK, USA LP, and DOES 1 through
16 100, inclusive,

17 Defendants.

- 1) **FAILURE TO PAY
OVERTIME AND
DOUBLETIME PREMIUM
WAGES;**
2) **PAY STUB VIOLATIONS;**
3) **UNFAIR COMPETITION;**
4) **FAILURE TO TIMELY PAY
FINAL WAGES; and**
5) **FLSA VIOLATIONS**

DEMAND FOR JURY TRIAL

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20
21 **TO ALL INTERESTED PARTIES HEREIN AND TO THEIR ATTORNEYS
22 OF RECORD:**

23 COME NOW, PLAINTIFF Brant E. Kinnsch (“Plaintiff”) and submits the
24 following Complaint against ZWICK, USA LP and DOES 1 through 100, inclusive
25 (collectively “Defendants”), and each of them as follows.

26 **INTRODUCTION**

27 1. Plaintiff began his employment as a Field Service Engineer at ZWICK, USA
28 LP (hereinafter “ZWICK”) on or about July 15, 2013. He was hired pursuant to an offer

1 letter dated June 28, 2013 at an annual salary of \$65,000 plus various benefits including
2 participation in the Company's bonus program. He resigned his employment effective
3 July 1, 2016.

4 2. While Plaintiff was considered and paid as an exempt employee by ZWICK,
5 his job duties did not consist of the exempt work under either Federal or California law.
6 As a Field Service Engineer he repaired, maintained and calibrated testing machines that
7 had been sold to customers of ZWICK. Testing involved various mechanical
8 manipulations or measurements of the equipment including testing compression, bend
9 testing, pull testing, pressure testing and similar operations. These tests were established
10 protocols for the various items of equipment that he tested. Plaintiff was not involved in
11 management or supervision of employees, was not involved in the administration or
12 management of the business. Moreover, Plaintiff is not a professional within the meaning
13 of the applicable exemptions. None of this work entailed duties that would qualify as
14 exempt pursuant to California Wage and Hour law or the Federal Fair Labor Standards
15 Act ("FLSA").

16 3. Plaintiff's typical travel week started at 3:00 or 4:00 AM on Monday when
17 he would travel from his home to the away location. Typically it would be 12 to 14 hours
18 from portal to portal. Tuesday through Thursday generally involved 10 hour days with
19 Friday being the return day. Typically, he would leave from the hotel at the worksite
20 around 4:00 AM and would arrive home in Thousand Oaks, California late in the evening.
21 These days were also typically 12 to 14 hour days.

22 4. Between January 1, 2014 and July 1, 2016, while working in California,
23 including travel to and from, Plaintiff worked approximately no less than 343.25 hours
24 in excess of 8 in a day or 40 in a week and approximately no less than 34 hours in
25 excess of 12 in a day or 8 on a seventh day. In addition to those hours, since September
26 15, 2014, while working in the rest of the United States, he worked approximately no
27 less than 602 hours of overtime based upon hours in excess of 40 in a week.

28 5. Even though Plaintiff was paid a salary, under California law, he is entitled

1 to be paid one and one-half times his “regular rate of pay” for hours worked in excess of
2 8 up to including twelve hours in a day, double his regular rate of pay for hours worked
3 in excess of 12 in a day, one and one-half times his regular rate of pay for the first eight
4 hours worked on the seventh day and double the rate for hours worked in excess of 8 on
5 the seventh day. This applies to all work in the state of California. (See California Wage
6 Order 4-2001section 3 (A) (1).) Under the Fair Labor Standards Act, for all work
7 performed outside of California but within the United States, he is entitled to be paid one
8 and one-half times his regular rate of pay for all hours worked in excess of 40 in a week.
9 (29 USC §207(a).)

10 6. None of the exemptions from overtime under either California law or the
11 FLSA apply to Plaintiff who should have been paid overtime premium pay in accordance
12 with California law while in and travelling from and to California and pursuant to Federal
13 law for all other work performed within the United States.

14 7. On or about August 30, 2016, Plaintiff made ZWICK aware of his intent to
15 file a civil action against ZWICK for unpaid overtime premium pay under California law
16 and the FLSA, and for unpaid double time under California law, liquidated damages
17 under the FLSA, penalties pursuant to California Labor Code sections 203 and 226,
18 attorneys’ fees, interest and related claims in connection with his employment ZWICK.
19 On or about October 10, 2016, Plaintiff and ZWICK entered into a Tolling and Standstill
20 Agreement to toll any statutes of limitations to preserve any claim existing as of
21 September 15, 2016.

22 **VENUE AND JURISDICTION**

23 8. Jurisdiction over Plaintiff’s federal claims is based upon (a) Section 16(b)
24 of the Fair Labor Standards Act, 29 U.S.C. § 216(b), which authorizes employees to bring
25 civil actions in courts of appropriate jurisdiction to recover damages for an employer’s
26 failure to pay overtime wages as required by the FLSA; and (b) 29 U.S.C. §§ 1331 and
27 1337.

28 9. Venue in this district is proper pursuant to 28 U.S.C. § 1391(b). At all times

1 material herein, Defendant ZWICK has been actively conducting business in the State of
2 California and within the geographic area encompassing the Northern District of the State
3 of California and Plaintiff performed the majority of his work in California for ZWICK
4 in that District.

5 10. Jurisdiction over Plaintiff's state law claims under the California Labor
6 Code and the claim under section 17200 of the California Business and Professions Code
7 are based upon this Court's supplemental jurisdiction under 28 U.S.C. § 1367(a), because
8 the state law claims are so related to Plaintiff' federal claims that they form a part of the
9 same case or controversy between Plaintiff and Defendants.

10 **THE PARTIES**

11 11. At all times herein mentioned, and from approximately the period July 15,
12 2013 until July 1, 2016, Plaintiff was an employee of Defendants, working for Defendants
13 as a Field Service Engineer in the State of California and throughout the United States.

14 12. At all times herein mentioned, Plaintiff is informed and believes and, based
15 on such information and belief, thereon alleges that Defendant ZWICK is an entity of
16 unknown status with its United States headquarters in Kennesaw, Georgia that does
17 business in the Central District of California.

18 13. At all times material to this action, Defendants have been enterprises
19 engaged in commerce or in the production of goods for commerce as defined by section
20 203(s)(1) of the FLSA, and have had a gross volume of sales exceeding \$500,000.

21 14. At all times material to this action, Defendants have been an "employer" of
22 the named Plaintiff, as defined by section 203(d) of the FLSA.

23 15. The true names and capacities, whether individual, corporate, associate,
24 representative or otherwise, of the defendants identified herein as Does 1 through 100,
25 inclusive, are unknown to Plaintiff, who therefore sue these defendants by said fictitious
26 names. Plaintiff will amend this Complaint to allege the true names and capacities of
27 Does 1 through 100 when they have been ascertained. Does 1 through 100 are in some
28 manner legally responsible for the wrongs and injuries alleged herein.

1 16. Each of the Defendants acted as the agent or employee of the others and each
2 acted within the scope of that agency or employment.

3 **FIRST CAUSE OF ACTION**

4 ***Failure To Pay Overtime And Doubletime Premium Wages***

5 **(Against All Defendants)**

6 17. Plaintiff incorporates by reference and re-alleges each and every one of the
7 allegations contained in the preceding and foregoing paragraphs of this Complaint as if
8 fully set forth herein.

9 18. California law requires payment of overtime premium pay for all hours
10 worked by non-exempt employees in excess of eight in one day or 40 hours in one week
11 and for the first eight hours on the seventh-straight day of work in one workweek. Lab.
12 Code § 510. It further requires payment of doubletime premium pay for all hours worked
13 by non-exempt employees in excess of twelve hours in one day or in excess of eight hours
14 on the seventh-straight day of work in a single workweek. *Id.*

15 19. Plaintiff regularly worked hours for which he was not paid overtime or
16 doubletime premium wages, including for hours he worked in excess of eight in a day,
17 40 in a week, and on the seventh straight day of work in a workweek. By way of example,
18 Plaintiff regularly worked in excess of eight hours each day due to the nature of the
19 business and the fact that he regularly had to travel to perform his job.

20 20. Plaintiff seeks such overtime and doubletime premium wages owed to him
21 for the three-year period measured backward from September 15, 2016 the date of the
22 filing of the initial Complaint in this matter. (In the Unfair Business Practices cause of
23 action stated herein, Plaintiff seeks restitution of unpaid overtime and doubletime wages
24 due for the four-year period measured backward from September 15, 2016.)

25 21. The exact amount of overtime and doubletime premium wages owed will
26 not be fully ascertained until discovery is completed.

27 22. Labor Code section 218.6 states, “[I]n any action brought for the
28 nonpayment of wages, the court shall award interest on all due and unpaid wages at the

1 rate of interest specified in subdivision (b) of Section 3289 of the Civil Code, which shall
2 accrue from the date that the wages were due and payable as provided in Part 1
3 (commencing with Section 200) of Division 2.” Interest is also available under Labor
4 Code section 1194. Plaintiff seeks such interest on all overtime and doubletime premium
5 wages owed to him and the California Class for the three-year period measured backward
6 from the date of the filing of the initial Complaint in this matter.

7 23. Pursuant to Labor Code section 1194, Plaintiff requests the Court to award
8 Plaintiff’s reasonable attorney’s fees and costs incurred in this action.

9 **SECOND CAUSE OF ACTION**

10 ***Pay Stub Violations***

11 **(Against All Defendants)**

12 24. Plaintiff incorporates by reference and re-alleges each and every one of the
13 allegations contained in the preceding and foregoing paragraphs of this Complaint as if
14 fully set forth herein.

15 25. California Labor Code section 226 provides:

16 Every employer shall, semimonthly or at the time of each
17 payment of wages, furnish each of his or her employees, either
18 as a detachable part of the check, draft, or voucher paying the
19 employee's wages, or separately when wages are paid by
20 personal check or cash, an itemized statement in writing showing
21 (1) gross wages earned, (2) total hours worked by the employee,
22 except for any employee whose compensation is solely based on
23 a salary and who is exempt from payment of overtime under
24 subdivision (a) of Section 515 or any applicable order of the
25 Industrial Welfare Commission, (3) the number of piece-rate
26 units earned and any applicable piece rate if the employee is paid
27 on a piece-rate basis, (4) all deductions, provided, that all
28 deductions made on written orders of the employee may be

1 aggregated and shown as one item, (5) net wages earned, (6) the
2 inclusive dates of the period for which the employee is paid, (7)
3 the name of the employee and his or her social security number,
4 (8) the name and address of the legal entity that is the employer,
5 and (9) all applicable hourly rates in effect during the pay period
6 and the corresponding number of hours worked at each hourly
7 rate by the employee.

8 26. In this case, Defendants have failed to provide such wage deduction
9 statements to Plaintiff in that his wage deduction statements do not include, without
10 limitation, his accurate gross wages earned, all overtime/doubletime hours worked, net
11 wages earned, or all applicable hourly rates in effect during the pay period, and the
12 corresponding number of hours worked at each hourly rate by the employee. Defendants
13 have intentionally failed to put the information required by section 226(a) on the
14 paycheck stubs.

15 27. Pursuant to Labor Code section 226(e), damages are appropriate. At this
16 time, Plaintiff believes and alleges that he is owed the maximum allowable penalty under
17 section 226(e) because Defendants intentionally failed to provide adequate paycheck
18 stubs. However, the exact amount of damages under Labor Code section 226(e) will not
19 be fully ascertained until discovery is completed.

20 28. Pursuant to Labor Code section 226(e), Plaintiff requests the court to award
21 Plaintiff's reasonable attorney's fees and costs incurred by Plaintiff in this action.

22 **THIRD CAUSE OF ACTION**

23 ***Unfair Competition***

24 **(Against All Defendants)**

25 29. Plaintiff incorporates by reference and re-alleges each and every one of the
26 allegations contained in the preceding and foregoing paragraphs of this Complaint as
27 though fully set forth herein.

28 30. This cause of action is being brought pursuant to California Business and

1 Professions Code section 17200 et seq. and California case law including *Cortez v.*
2 *Purolator Air Filtration Products Co.*, 23 Cal.App.4th 163 (2000).

3 31. It is alleged that Defendants have willfully failed to pay Plaintiff the state-
4 mandated overtime and doubletime premium wages and the FLSA-mandated overtime
5 premiums for all such hours worked. It is also alleged that Defendants have violated
6 California's expense reimbursement laws. The failure to pay such wages and expenses
7 under state and federal law constitutes unfair business practices under California Business
8 and Professions Code section 17200.

9 32. As a result of the conduct of Defendants, Defendants profited from breaking
10 the law. Plaintiff seeks disgorgement of Defendants' unlawfully obtained benefits (plus
11 interest thereon) for the four-year period measured backward from September 15, 2016.

12 33. California Business and Professions Code section 17203, under the authority
13 of which a restitutionary order may be made, provides:

14 Any person who engages, has engaged, or proposes to engage in
15 unfair competition may be enjoined in any court of competent
16 jurisdiction. The court may make such orders or judgments,
17 including the appointment of a receiver, as may be necessary to
18 prevent the use of employment by any person of any practice
19 which constitutes unfair competition, as defined in this chapter,
20 or as may be necessary to restore to any person in interest any
21 money or property, real or personal, which may have been
22 acquired by means of such unfair competition.

23 34. As a result of the alleged aforesaid actions, Plaintiff has suffered injury in
24 fact and has lost money as a result of such unfair competition.

25 35. In this case, it is requested that this Court order restitution of all unpaid
26 wages found to be owing for the four-year period prior to September 15, 2016, up through
27 the present, and issue all other appropriate equitable relief, including without limitation
28 an order enjoining Defendants from continuing to treat the California Class as exempt

1 from California's overtime laws and, instead, to pay Plaintiff and members of the
2 California Class overtime premiums for all overtime hours worked.

3 **FOURTH CAUSE OF ACTION**

4 ***Failure To Timely Pay Wages At Termination***

5 **(Against All Defendants)**

6 36. Plaintiff incorporates by reference and re-alleges each and every one of the
7 allegations contained in the preceding and foregoing paragraphs of this Complaint as if
8 fully set forth herein.

9 37. Labor Code section 201 provides, in relevant part, "If an employer
10 discharges an employee, the wages earned and unpaid at the time of discharge are due
11 and payable immediately." Lab. Code § 201(a). Labor Code section 202 provides, in
12 relevant part, "If an employee not having a written contract for a definite period quits his
13 or her employment, his or her wages shall become due and payable not later than 72 hours
14 thereafter, unless the employee has given 72 hours previous notice of his or her intention
15 to quit, in which case the employee is entitled to his or her wages at the time of quitting."
16 Lab. Code § 202(a). Defendants did not pay immediately all wages earned and unpaid to
17 Plaintiff upon his resignation. Defendants have refused and continue to refuse to pay said
18 wages.

19 38. Pursuant to Labor Code section 203, Defendants have willfully failed to pay
20 without abatement or reduction, in accordance with Labor Code sections 201 and 202 all
21 of the overtime and doubletime wages of the Plaintiff as herein alleged. Defendants are
22 aware that they owe the wages claimed by Plaintiff yet Defendants willfully failed to
23 make payment. As a result, Plaintiff seeks wages and waiting-time penalties pursuant to
24 Labor Code section 203. These penalties consist of up to 30 days of pay for Plaintiff at
25 his regular rate of pay.

26 39. Plaintiff has been available and ready to receive wages owed to him.

27 40. Plaintiff has never refused to receive any payment, nor has he been absent
28 from their regular places of residence.

1 41. Defendants' failure to pay wages due and owing Plaintiff, as indicated in
2 prior paragraphs, was willful; Defendants have knowingly refused to pay any portion of
3 the amount due and owing Plaintiff.

4 **FIFTH CAUSE OF ACTION**

5 ***FLSA Violations***

6 **(Against All Defendants)**

7 42. Plaintiff incorporates by reference and re-alleges each and every one of the
8 allegations contained in the preceding and foregoing paragraphs of this Complaint as if
9 fully set forth herein, except those paragraphs that are inconsistent with this cause of
10 action brought pursuant to the FLSA.

11 43. The FLSA regulates, among other things, the payment of overtime pay by
12 employers whose employees are engaged in commerce, or engaged in the production of
13 goods for commerce, or employed in an enterprise engaged in commerce or in the
14 production of goods for commerce. 29 U.S.C. § 207(a)(1).

15 44. At all relevant times, Defendants were an "employer" engaged in interstate
16 commerce and/or in the production of goods for commerce, within the meaning of the
17 FLSA, 29 U.S.C. § 203. At all relevant times, Plaintiff worked for Defendants.

18 45. Section 7(a)(1) of the FLSA, 29 U.S.C. § 207(a)(1), requires employers to
19 pay non-exempt employees who work longer than forty (40) hours in a workweek one
20 and one-half times the employee's regular rate of pay for the hours worked in the
21 workweek in excess of forty (40) hours. Defendants are, and were, subject to this
22 requirement to pay Plaintiff one and one-half times his regular rate of pay for all hours
23 worked in excess of forty (40) in a workweek. Defendants violated the FLSA by refusing
24 to pay Plaintiff overtime as required by law. Defendants regularly worked Plaintiff more
25 than 40 hours each workweek, and yet rather than pay overtime premiums, Defendants
26 paid Plaintiff on a salary.

27 46. Defendants' violations of the FLSA as alleged herein have been done in a
28 willful and bad faith manner such that Plaintiff is entitled to damages equal to the amount

1 of overtime premium pay within the three years preceding September 15, 2016, plus
2 periods of equitable tolling. As a result of the aforesaid willful violations of the FLSA,
3 overtime compensation has been unlawfully withheld by Defendants from Plaintiff for
4 which Defendants are liable under 29 U.S.C. § 216(b), together with an additional equal
5 amount as liquidated damages, as well as interest, reasonable attorney's fees and costs.

6 47. Plaintiff seeks damages according to proof in the amount of all unpaid
7 overtime compensation owed to him, liquidated damages as provided by the FLSA, 29
8 U.S.C. § 216(b), interest, and such other legal and equitable relief as the Court deems just
9 and proper.

10 48. Plaintiff seeks recovery of attorney's fees and costs to be paid by
11 Defendants, as provided by the FLSA, 29 U.S.C. § 216(b).

12 WHEREFORE, Plaintiff, prays for relief under California law, as follows:

13 1. For overtime and doubletime premium wages owed under California law
14 according to proof;

15 2. For prejudgment interest pursuant to Labor Code sections 218.6 and 1194
16 and Civil Code sections 3288 and 3291 on all amounts claimed;

17 3. For attorney's fees and costs pursuant to Labor Code sections 218.5, 226,
18 and 1194;

19 4. For waiting-time penalties under Labor Code section 203;

20 5. For statutory penalties under Labor Code section 226;

21 6. For an equitable order, ordering Defendants to pay Plaintiff all wages and
22 interest he is owed;

23 7. For any and all injunctive relief this Court deems necessary pursuant to
24 Business and Professions Code section 17203, including an injunction ordering
25 Defendants to begin paying overtime premiums to their Field Service Engineers in
26 California;

27 8. For a declaratory judgment declaring that Defendants have willfully and
28 wrongfully violated their statutory and legal obligations and deprived Plaintiff of his

1 rights, privileges, protections, compensation, benefits, and entitlements under California
2 law, as alleged herein;

3 9. For a complete and accurate accounting of all the compensation to which the
4 Plaintiff is entitled;

5 10. For costs of suit; and

6 11. For any other and further relief that the Court considers just and proper.

7 WHEREFORE, Plaintiff prays for relief under the FLSA, as follows:

8 12. For judgment that Plaintiff is a non-exempt employee entitled to protection
9 under the FLSA;

10 13. For judgment against Defendants for violation of the overtime provisions of
11 the FLSA;

12 14. For judgment that Defendants' violations as described above were willful;

13 15. For an award in an amount equal to Plaintiff unpaid back wages at the
14 applicable overtime rate;

15 16. For an award to Plaintiff for the amount of unpaid wages owed, liquidated
16 damages and penalties where provided by law, and interest thereon, subject to proof at
17 trial;

18 17. For an award of reasonable attorney's fees and costs pursuant to 29 U.S.C.
19 § 216 and/or any other applicable laws;

20 18. For an award of prejudgment interest to the extent liquidated damages are
21 not awarded;

22 19. For costs of suit; and

23 20. For such other and further relief, in law or equity, as this Court may deem
24 appropriate and just.

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DATED: January 5, 2017

By: _____/S/_____
 Anthony Strauss,
 Attorneys for Plaintiff Brant E. Kinnsch